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No. 90-925

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent makes virtually no effort to rebut our submission that the court of appeals seriously erred in holding that the Attorney General abused his discretion when he decided that the special humanitarian relief of asylum should be withheld from respondent, an active member of a terrorist organization and convicted murderer. That holding undermines the credibility of the United States' efforts to combat terrorism and promote respect for the rule of law. In addition, the court of appeals' insistence that asylum determinations be wholly divorced from the foreign-policy context in which they arise threatens to interfere both with the fair and sensible administration of the asylum program and the President's ability to fashion refugee policies consistent with the national interest.

The court of appeals compounded its error by refusing to respect the Attorney General's discretionary determi-

nation that respondent had not shown a justification for reopening the deportation proceedings to allow him to file an *untimely* application for asylum and withholding of deportation, especially since respondent previously had waived his right to seek that relief. Such interference with the Attorney General's discretion in administering the immigration laws fails to respect this Court's decisions emphasizing the narrow scope of judicial review in the reopening context. Respondent's efforts to justify that interference are unavailing.

Contrary to respondent's contention (Br. in Opp. 23-25, 26, 31, 43-46), there are no "recent developments" that detract from our submission that the asylum and reopening issues warrant review by this Court. The new statutory provision and recent settlement decree on which respondent relies do not address the issues in this case. See pages 4-5 and 9-10, *infra*.

A. 1. The court of appeals held that the Attorney General has only a "limited role" and "limited discretion" in deciding whether to grant or deny asylum under Section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158. Pet. App. 25a. In particular, the court held that the Attorney General may not consider "factors such as the government's geopolitical and foreign policy interests"—including "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Id.* at 21a, 26a. We explain in the certiorari petition (at 14-15) that these limitations cannot be reconciled with the text of Section 208(a). That provision confers unfettered discretion on the Attorney General to determine whether an alien who satisfies the threshold requirement of being a "refugee" should be granted asylum. See 8 U.S.C. 1158(a) (an alien "may be granted asylum *in the discretion of the Attorney General* if the Attorney General determines that he is a refugee within the meaning of section 1101(a)(42)(A)") (emphasis added). Compare *Jay* v. *Boyd*, 351 U.S. 345, 351-352 (1956). Remarkably, respondent fails even to mention the text of

Section 208(a), the very provision under which he seeks relief.

2. Respondent's only substantive point on the asylum issue is a passing endorsement (Br. in Opp. 41) of the Second Circuit's reliance on the legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. See Pet. App. 20a-24a. But as we previously explained (Pet. 17-19), the court of appeals completely misread the legislative history. What Congress did in the Refugee Act was to remove the geographical and ideological limitations on *eligibility* for the special relief that could be granted to aliens outside the United States under 8 U.S.C. 1153(a)(7)(A)(i) (1976), a provision applied only to aliens from Communist countries or the Middle East. Congress replaced that provision with a new Section 207, 8 U.S.C. 1157, which permits the Attorney General, in his "discretion," to admit "refugees" (now defined in geographically and ideologically neutral terms in 8 U.S.C. 1101(a)(42)(A)) from outside the United States, subject to flexible numerical limitations. The court of appeals' notion that Congress barred the Attorney General from considering foreign-policy factors in exercising that discretion is refuted by 8 U.S.C. 1157(e)(6), which identifies "the foreign policy interests of the United States" as a relevant factor.

Section 208 of the Act, at issue here, grants the Attorney General corresponding authority to grant special relief (asylum) to refugees who are already in the United States. There is nothing in the text or legislative history of Section 208 even remotely suggesting that the Attorney General is barred from considering in the asylum context the very foreign-policy interests that Congress required to be taken into account in admitting refugees under Section 207. As with our discussion of the text of Section 208, respondent does not attempt to refute our explanation of the errors in the court of appeals' analysis of the legislative history.

3. Respondent contends (Br. in Opp. 42-46) that the Attorney General's reliance on foreign policy considera-

tions is inconsistent with the recent settlement agreement in *American Baptist Churches* v. *Thornburgh*, Civ. No. C-85-3255 RFP (N.D. Cal.), a class action brought on behalf of Salvadoran and Guatemalan aliens. Not so. The settlement provides that "foreign policy" and "the fact that an individual is from a country whose government the United States supports or with which it has favorable relations" are "not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." Br. in Opp. App. 51. The quoted passages provide only that foreign policy considerations are not relevant in determining whether an alien has a well-founded fear of persecution, and thus qualifies as a "refugee" within the meaning of 8 U.S.C. 1101(a)(42)(A). However, "refugee" status establishes only that an alien is *eligible* for asylum. As we have explained, whether an alien who meets that threshold requirement will actually be granted asylum is expressly committed to the discretion of the Attorney General under Section 208(a). That provision says nothing to prohibit the Attorney General from taking into account foreign-policy considerations, including our Nation's opposition to terrorism. Hence, there is no inconsistency whatever between the Attorney General's reliance on such factors in this case and the settlement agreement in *American Baptist Churches*.

4. As we have pointed out (Pet. 15-16), the court of appeals' conclusion that the Attorney General has only a "limited role" and "limited discretion" under Section 208(a) cannot be squared with this Court's expansive view of the Attorney General's discretion in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 nn. 5 & 6, 441 (1987). Once again, respondent is silent; he makes no effort to reconcile the court of appeals' crabbed view of the Attorney General's discretion with *Cardoza-Fonseca*. Indeed, respondent does not even mention that decision. Nor does respondent dispute our submission (Pet. 21) that the Second Circuit's holding in this respect is inconsistent with decisions of other courts that have made

clear that foreign policy concerns are intimately associated with asylum decisions. See *Alvarez-Flores* v. *INS*, 909 F.2d 1, 4 n.1 (1st Cir. 1990); *M.A. A26851062* v. *INS*, 899 F.2d 304, 313-314 (4th Cir. 1990) (en banc); *Kashani* v. *Nelson*, 793 F.2d 818, 827-828 (7th Cir.), cert. denied, 479 U.S. 1006 (1986); accord *INS* v. *Abudu*, 485 U.S. 94, 110 (1988) (quoted at Pet. 20). In light of this divergence from other appellate rulings, the clear error below, and the substantial importance of the question, review of the court of appeals' asylum ruling is warranted.

B. 1. Respondent tries to obscure the unprecedented limitations the court of appeals has placed on the Attorney General's discretion in asylum cases by focusing (Br. in Opp. 28-40) on the procedural aspects of the court of appeals' holding. In respondent's view, the Attorney General could not deny him asylum or withholding of deportation without a hearing—even though respondent previously had made a tactical decision to forgo such relief. Respondent is wrong. This Court has repeatedly held that whether to grant a motion to reopen deportation proceedings is committed to the Attorney General's discretion, *INS* v. *Abudu*, 485 U.S. at 105-106; *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143-144 n.5 (1981); thus a court may order reopening "only in the most extraordinary circumstances." *Abudu*, 485 U.S. at 107 n.11. As *Abudu* confirms, the Attorney General may deny a motion to reopen even where the alien seeks to apply for asylum or withholding of deportation. To be sure, in such a case, there would be no hearing on the question of asylum or withholding of deportation. But that is the consequence of the alien's default in failing to apply for special relief at the proper time, when a hearing might have been held. Thus, contrary to respondent's assertion (Br. in Opp. 38), the Attorney General's denial of the motion to reopen in this case was fully consistent with both "the letter and spirit of existing authorities" concerning an

opportunity for a hearing on requests for asylum and withholding of deportation.[1]

2. The Attorney General was especially justified in denying the motion to reopen in this case without a hearing, because there is no dispute about the conduct of respondent on which the Attorney General relied in concluding that he should be denied asylum as a discretionary matter and would be ineligible for withholding of deportation under the exceptions in 8 U.S.C. 1253(h)(2)(A) and (C). See Pet. 7, 26-29. Respondent does not deny that he is a member of the Provisional Irish Republican Army (PIRA) or that he had an active leadership role in the PIRA in Northern Ireland, serving as an officer, gathering ammunition, distributing arms, and training and drilling other PIRA members. Pet. App. 89a-91a. Nor does respondent deny that he was convicted for a firearms violation; for smuggling explosives in a hijacked car; and for murder, attempted murder, and possession of firearms and ammunition in the 1980 epi-

[1] None of the "existing authorities" on which respondent relies (Br. in Opp. 38) concerns an application for asylum or withholding of deportation submitted with a motion to reopen. Indeed, the cited paragraphs of the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979), prepared by the United Nations High Commissioner for Refugees, discuss the criteria to be applied in determining *refugee status*. The *Handbook* specifically "does not deal with * * * the granting of asylum to refugees or the legal treatment of refugees after they have been recognized as such." *Id.* at 7 para. 24. In this case, the Attorney General assumed, *arguendo*, that respondent satisfied the threshold eligibility requirement of being a refugee, Pet. App. 12a, 82a-83a, and it addressed only the latter questions. The *Handbook* therefore has no relevance here. The recently revised INS regulations that respondent cites prescribe standards for considering an asylum or withholding-of-deportation claim in the normal course, not, as here, a belated effort to raise such a claim in a motion to reopen. See 8 C.F.R. 208.13(c), 208.14 and 208.16(c), as revised by 55 Fed. Reg. 30,683-30,684 (1990). Finally, in the judicial and BIA decisions on which respondent relies (Br. in Opp. 38), the asylum application was timely filed, but the immigration judge or BIA either failed to exercise any discretion or failed to consider certain relevant factors.

sode in Belfast—which involved hijacking a van, seizing a private residence, holding civilians hostage, ambushing a car full of British soldiers, and killing a British officer. *Id.* at 2a, 46a-47a, 84a-88a. In fact, respondent admitted all of these things in his testimony in the extradition hearing. *Id.* at 43a-44a, 46a-48a, 87a & n.47, 88a-91a.

3. In arguing that the Attorney General erred in finding him ineligible for withholding of deportation because there were "serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside of the United States" and "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion" (8 U.S.C. 1253(h)(2)(C) and (A); see Pet. App. 89a-91a), respondent relies (Br. in Opp. 33-36) on Judge Sprizzo's refusal to authorize his extradition to the United Kingdom. Judge Sprizzo believed, erroneously in our view, that respondent's crimes in Belfast fell within the then-existing exception in the extradition treaty for "political" offenses. *In re Requested Extradition of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984); see Pet. 3 n.3.

The court of appeals did not suggest that the denial of extradition obligated the Attorney General to find that respondent fell outside the statutory exclusions from eligibility for withholding of deportation. See Pet. App. 15a-17a. And with good reason. As the Attorney General explained, respondent's eligibility for withholding of deportation involves questions of statutory interpretation under the Immigration and Nationality Act that are distinct from the question of treaty interpretation in an extradition case. *Id.* at 84a n.44. Moreover, as Judge Lumbard noted (*id.* at 44a n.8), the denial of an application for an extradition warrant is not appealable and has no res judicata effect. For these reasons, the Ninth Circuit has specifically held that an alien may be found ineligible for withholding of deportation under 8 U.S.C. 1253(h)(2)(C), even though his offense had previously been determined in an extradition proceeding to fall

within a treaty exception for political offenses. *McMullen* v. *INS*, 788 F.2d 591, 596-597 (9th Cir. 1986).

4. In denying respondent's motion to reopen, the Attorney General relied not only on the ground that respondent would not ultimately be granted the discretionary relief of asylum or be found eligible for withholding of deportation (Pet. App. 81a-91a); he also relied on the independent ground that respondent had not identified new evidence or changed circumstances that warranted reopening to allow respondent to apply for the relief he previously had waived. *Id.* at 62a-78a. The court of appeals nevertheless found reopening justified by two events: Attorney General Meese's decision rejecting respondent's designation of Ireland as the country of deportation, and the 1987 Irish Extradition Act. *Id.* at 12a-15a. Respondent now disavows any reliance on Attorney General Meese's decision (Br. in Opp. 9-10, 16-17) and relies only on the Irish Extradition Act, which implemented a European extradition convention that essentially deleted the "political offense" exception.

As we have explained (Pet. 24-25), Attorney General Thornburgh concluded, after thorough analysis, that the Irish Extradition Act did not constitute "new evidence" or changed circumstances warranting reopening. Pet. App. 59a, 67a-74a. He reasoned: (1) that as respondent himself had previously argued, there was a substantial likelihood under Irish law that he would have been extradited to the United Kingdom even before the Extradition Act was passed; (2) that Ireland had signed the European convention six months *before* respondent withdrew his original application for asylum and withholding of deportation; and (3) that any change in Irish law was irrelevant because respondent will not be deported to Ireland, because the deportation proceedings arise under United States (not Irish) law, and because respondent's asylum and withholding-of-deportation claims turn on conditions in the United Kingdom (not Ireland). Respondent makes no meaningful effort to rebut this reasoning. He merely asserts in passing that "[t]he Attorney General eschewed reference to the Extradition Act's Section 3 [the provision that eliminated the political offense exception], which refutes the determination that the Act had no material effect on the respondent's position." Br. in Opp. 17. This argument is frivolous. The entire point of the Attorney General's discussion of the Extradition Act was that the Act's formal elimination of the political offense exception did not work a material change in Irish law.

Respondent also argues (Br. in Opp. 12-15, 27, 37) that reopening was waranted by the allegedly "new" evidence of conditions in Northern Ireland that he submitted with his motion to reopen. Respondent fails to point out that the Attorney General exhaustively reviewed that submission (Pet. App. 74a-78a) and found that it did *not* warrant reopening, because substantially all of it was "either cumulative of that [respondent] has previously presented, discoverable long ago, or not material in light of the evidence that was presented." *Id.* at 75a; see Pet. 26 n.17. The court of appeals did not find that the Attorney General abused his discretion in this regard (see *Abudu*, 485 U.S. at 106-110); the court found it unnecessary to reach that question because it held that Attorney General Meese's decision and the Irish Extradition Act required reopening. Pet. App. 15a. Respondent's assertion (Br. in Opp. 27) that "his evidence of persecution has been found compelling enough to warrant [a hearing]" therefore is flatly incorrect.

5. Respondent argues (Br. in Opp. 24, 30-31) that review of the reopening issue is not warranted in light of Section 545(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (reproduced at Br. in Opp. App. 48-49), which requires the Attorney General, by May 19, 1991, to issue regulations governing the time for filing motions for reopening and reconsideration and the number of such motions that may be filed. This argument is meritless. Section 545(d) of the 1990 Act addresses essentially procedural matters involving filing times and abuse of process through repetitive motions.

It does not resolve the distinct question, presented here, of the standards to be applied in passing on such motions. Thus, the court of appeals' ruling on the reopening issue, like its ruling on the asylum issue, warrants review by this Court.

6. Contrary to respondent's contention (Br. in Opp. 23-24, 26-27, 28, 31-32, 39-40, 47), the fact that the court of appeals remanded to INS for a hearing on the merits of respondent's asylum and withholding-of-deportation claims does not render the case 'interlocutory" in a sense that counsels against certiorari. The court of appeals required a hearing only as a consequence of its holding that the Attorney General abused his discretion in denying respondent's motion to reopen to allow him to apply for asylum and withholding of deportation. That holding is the very subject of our certiorari petition, and our challenge to it would be largely mooted if the hearing were held. Moreover, the court of appeals has definitively held that the Attorney General may not rely on foreign policy considerations (including the Nation's opposition to terrorism) in deciding whether to grant asylum to an alien. That erroneous ruling should not be permitted to stand, and to generate adverse consequences, while awaiting a hearing on remand that will shed no further light on the issue. This case should be brought to a close now.

For the foregoing reasons and those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

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